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In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 15

E. P. JACOBS AND AUGUSTUS GUNTER, EXECUTOR OF the Last Will of Mrs. S. B. Gunter, Deceased, petitioners

v.

THE UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The findings and conclusions of the District Court (R. 21–27) are not reported. The opinion of the Circuit Court of Appeals (R. 38–40) is reported in 63 F. (2d) 326.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered February 13, 1933. (R. 40.) The petition for certiorari was filed March 27, 1933, and was granted May 8, 1933 (289 U.S. 719). The jurisdiction of this Court rests on Section 240 (a)

of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in a suit against the United States under the Tucker Act for the taking of a right of flowage over petitioners' lands, resulting from the construction of a dam authorized by an Act of Congress, the petitioners may recover interest on the amount of damage to their lands from the time of the completion of the dam.

STATUTES INVOLVED

Section 177 of the Judicial Code as amended (U.S.C., Title 28, Sec. 284) provides:

> SEC. 177. No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

The construction of Widow's Bar Dam was authorized by the Rivers and Harbors Act of July 27, 1916, by the following provision (39 Stat. 391, 399):

> * * * for continuing improvement by the construction of locks and dams between Chattanooga, Tennessee, and Browns Island, Alabama, in accordance with the report submitted in House Document Numbered Three hundred and sixty, Sixty-second Congress, second session, as modified by the report of the Board of Engineers for Rivers and Harbors printed in Rivers and Harbors

> Committee Document Numbered One, Sixty-fourth Congress, first session, $500,000: *Provided,* That no contract shall be entered into for the construction thereof until the local interests shall assume and pay all claims for flowage damage or arrange to do so in manner satisfactory to the Secretary of War: *Provided further,* That one high dam or two low dams may be constructed according as the local interests may contribute the cost of all claims for flowage damage arising from either type of dams, respectively: * * *

The Act of March 2, 1919 (40 Stat. 1275, 1282), contained the following provision:

> Tennessee River, Tennessee, Alabama, and Kentucky: The Secretary of War is hereby authorized to prosecute the work of improvement on the existing project for the section between Chattanooga and Browns Island in accordance with the recommendation in report submitted in Rivers and Harbors Committee Document Numbered 8, Sixty-fifth Congress, third session, that the condition precedent requiring local interests to assume and pay all claims for flowage damages be waived.

The Act of April 24, 1888, c. 194, 25 Stat. 94 (U.S.C., Title 33, Sec. 591), provides as follows:

> That the Secretary of War may cause proceedings to be instituted, in the name of the United States, in any court having jurisdiction of such proceedings, for the acquire-

ment by condemnation of any land, right of way, or material needed to enable him to maintain, operate or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted: * * *.

STATEMENT.

The petitioner Jacobs filed a suit against the United States in the United States District Court for the Northern District of Alabama, alleging that he was the owner of a tract of land situated on Jones Creek, a tributary of the Tennessee River, that part of this land was destroyed and "taken" by overflow resulting from the construction of Widow's Bar Dam across the Tennessee River, and that damages were sustained in the amount of $10,000.00. (R. 3–6.)

On the first trial of the case, the District Court rendered judgment for the United States. This judgment was reversed by the Circuit Court of Appeals for the Fifth Circuit (45 F. (2d) 34) and the case was remanded to the lower court (R. 13–14). The case was then consolidated by the District Court with *Gunter* v. *United States,* and the two cases were tried together. (R. 19.)

The *Gunter* case involved a suit similar to that in the *Jacobs* case, and related to adjacent lands. The petition alleged that the petitioner's decedent

was the owner of a tract of land situated on the Tennessee River; that part of this land had been taken and destroyed by overflow, and that damages were sustained in the amount of $9,500.00. (R. 6–12.)

On the second trial, the District Court made findings of fact (R. 21–27), from which it appears that the petitioner Jacobs's farm suffered damage to the amount of $2,919.00 and that the petitioner Gunter's farm was damaged to the amount of $1,030.00 (R. 26–27), by reason of the taking on October 1, 1925, of an easement of flowage. Judgment was entered in favor of petitioners for these respective amounts, with interest at six percent from October 1, 1925, the date of completion of the dam, to the time of payment, together with the costs of the previous appeal. (R. 19–21.)

This judgment was reversed by the court below in so far as it awarded interest and costs on appeal. (R. 40.) The present petition raises only the question of petitioners' right to interest.

SUMMARY OF ARGUMENT

The rule has frequently been declared that in the absence of an express agreement or of statutory authority interest may not be allowed on a claim against the United States. Although this rule is unquestioned, its application in "just compensation" cases is a matter of difficulty.

The present case is a suit under the Tucker Act based upon an implied contract. *United States* v.

North American Co., 253 U.S. 330, was just such a case and is direct authority for the position that the claimants here are not entitled to interest. In several more recent cases, interest has been allowed in suits brought under the Tucker Act. *Liggett & Myers Tobacco Co.* v. *United States*, 274 U.S. 215; *Phelps* v. *United States*, 274 U.S. 341. But these have all been cases where the taking was under the Lever Act, or a similar statute expressly authorizing the payment of "just compensation." Although they decide that "just compensation" includes interest, it does not necessarily follow that interest must be paid on a claim based on an implied contract. There is language in some of these cases, particularly the *Phelps* case, which is difficult to reconcile with the decision in the *North American* case.

If the rule of the *North American* case is still to be followed, the judgment below should be affirmed. Whether that rule should be modified in view of the reasoning in the *Phelps* case and in other cases is a question for the consideration of this Court.

ARGUMENT

Section 177 of the Judicial Code (*supra*, p. 2) provides that—

> No interest shall be allowed on any claim up to the time of the rendition of judgment thereon by the Court of Claims, unless upon a contract expressly stipulating for the payment of interest.

This Court has frequently declared the rule that in the absence of an express agreement or of statutory authority interest may not be allowed on a claim against the United States. *Boston Sand & Gravel Co.* v. *United States,* 278 U.S. 41; *United States* v. *Commonwealth & Dominion Line,* 278 U.S. 427; *Seaboard Air Line Ry.* v. *United States,* 261 U.S. 299, 304; *United States* v. *Verdier,* 164 U.S. 213. Although this rule is well established, its application in "just compensation" cases is a matter of difficulty. It will be helpful, we believe, to present a brief resume of several of the cases bearing on this particular question.

In *United States* v. *North American Co.,* 253 U.S. 330, it was held that the rule precluding interest is applicable to a suit against the United States under the Tucker Act for a taking of private property, that such a suit is not founded upon the Fifth Amendment, but upon the existence of an implied contract entered into by the United States, and that the contract which is implied is to pay the value of the property as of the date of the taking. Consequently it was held that interest might not be added because of Section 177 of the Judicial Code. This case, it would seem, governs the case at bar, unless the ruling has been modified by later decisions of the Court. We quote from the opinion (pp. 334–338):

> The company contends that it should receive, in addition to the value of the prop-

erty at the time of the taking, compensation for the occupation and use thereof from that date to the date of the judgment—a period of nearly twenty years during which the company was deprived of the use of its property. * * *

The right to bring this suit against the United States in the Court of Claims is not founded upon the Fifth Amendment * * *, but upon the existence of an implied contract entered into by the United States. * * * And the contract which is implied is to pay the value of property as of the date of the taking. * * * Interest may not be added because § 177 of the Judicial Code, re-enacting § 1091 of the Revised Statutes, declares that: "No interest shall be allowed on any claim * * *."

* * *

The company argues that interest is allowed in condemnation proceedings, not *qua* interest for default or delay in paying the value, but as the measure of compensation for the use and occupation during the period which precedes the passing of the title * * *. This may be the theory on which interest should be allowed in compensation proceedings; and it may be that, even in the absence of the conformity provision referred to above, interest could be collected as a part of the just compensation in condemnation proceedings brought by the Government. For, * * * such a proceeding is not a suit by the landowner to collect a claim

> against the United States, but an adversary proceeding in which the owner is the defendant and which the Government institutes in order to secure title to land. * * * On the other hand, this suit brought in the Court of Claims is a very different proceeding. It is an action of contract to recover money which the United States is assumed to have promised to pay; and the assumed promise was to pay the value at the time of the taking. * * * that which the Company seeks to recover is, in substance, interest, and that Congress has denied to the Court of Claims power to allow.

The court below, referring to the *North American* case, stated (R. 39–40):

> The just cited case is controlling on the question now under consideration. The suit there as here was held to be upon an implied contract. There is nothing in conflict with it in other Supreme Court decisions relied on by appellees. United States v. Rogers, supra, and Seaboard Air Line Ry. v. United States, 261 U.S. 299, were condemnation cases. In each the North American case was referred to and distinguished on the ground that it was not a condemnation case.

United States v. *Rogers,* 255 U.S. 163, was an action brought in the District Court of the United States for New Mexico, to condemn lands of the defendant for reclamation purposes. The Court said (pp. 168–169):

Was there error in awarding the owners interest on the value of their lands appropriated from the time of actual taking of the same until compensation was made?

It is unquestionably true that the United States upon claims made against it, cannot, in the absence of a statute to that end, be subjected to the payment of interest. * * * In the present case the landowners did not sue upon a claim against the Government, as was the fact in *United States* v. *North American Transportation & Trading Co.*, 253 U.S. 330. The Government was seeking for purposes authorized by statute to appropriate the lands, and it had actually taken them, and had deprived the owners of all beneficial use thereof from the date from which the allowance of interest ran.

Having taken the lands of the defendants in error, it was the duty of the Government to make just compensation as of the time when the owners were deprived of their property. * * *

In fixing the compensation, the District Court, and the Circuit Court of Appeals in affirming the judgment, followed the New Mexico statute fixing the rate of interest at 6 percent. * * *

The Government urges that the Conformity Act of August 1, 1888, does not require the United States Government to be bound by the rule of the state statute in the allowance of interest. This may be true, but we

> agree with the courts below that the allowance of just compensation by giving interest from the time of taking until payment is a convenient and fair method of ascertaining the sum to which the owner of the land is entitled. * * *

In suits against the United States under the Lever Act, and similar legislation for the taking of private property, the statutes conferring authority to take also provided the remedy, and directed the payment or recovery of "just compensation." In such cases this Court has held that interest must be added to the value of the property as a part of the just compensation.

Seaboard Air Line Railway Co. v. *United States*, 261 U.S. 299, was an action brought in the District Court of South Carolina against the United States, under Section 10 of the Lever Act, to recover just compensation for property taken for public use. The jury found that $6,000 was the value of the property at the time of the taking, and judgment was entered for $6,000, with interest from the date of taking at seven percent, the statutory rate in South Carolina. The Circuit Court of Appeals reversed the District Court. This Court reversed the Circuit Court of Appeals and affirmed the decree of the District Court, allowing interest.

This Court said (pp. 304–305):

> The rule is that, in the absence of a stipulation to pay interest or a statute allowing it, none can be recovered against the

United States upon unpaid accounts or claims. * * *

Section 10 of the Lever Act authorizes the taking of property for the public use on payment of just compensation. There is no provision in respect of interest. Just compensation is provided for by the Constitution and the right to it cannot be taken away by statute. Its ascertainment is a judicial function. * * *

The compensation to which the owner is entitled is the full and perfect equivalent of the property taken. * * * It rests on equitable principles and it means substantially that the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken. * * * He is entitled to the damages inflicted by the taking. * * *

The United States in effect claims that the owner is entitled to no more than the value of the land, as of date of taking, to be paid at a later time, when ascertained. * * *

The owner's right does not depend on contract, express or implied. A promise to pay is not necessary. None is alleged. This suit is a part of the authorized procedure initiated by the United States for the condemnation of the land. The owner was not satisfied with the amount fixed by the President and sued. A necessary condition of the taking is the ascertainment and payment of just compensation. * * * The only question here is whether payment at a sub-

> sequent date of the value of the land as of the date of taking possession is sufficient to constitute just compensation.

This Court then distinguished the *North American* case as follows (p. 305):

> In support of its contention the Government cites *United States* v. *North American Transportation & Trading Co.*, 253 U.S. 330. That case does not sustain its contention. That was a suit in the Court of Claims based on an implied promise of the United States to pay for property appropriated by it. It was not a condemnation case. The distinction between that case and a condemnation case is pointed out in the opinion. It was there suggested, without so deciding, that in the case of condemnation of land, interest might be collected, even in the absence of state enactments allowing it adopted by the conformity provisions.

In *Campbell* v. *United States*, 266 U.S. 368, land was taken for a site for a nitrate plant. This Court held (pp. 370–371):

> The taking was under the sovereign power of eminent domain. The President and Secretary of War were authorized to purchase or condemn the lands. * * * And from the taking there arose an implied promise by the United States to compensate plaintiff for his loss. * * * Thereupon he became entitled to have the just compensation safeguarded by the Fifth Amendment to the Constitution; that is, the value of

> the land taken and the damages inflicted by the taking—such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken.

Liggett & Myers Tobacco Co. v. *United States,* 274 U.S. 215, was an action brought by the Tobacco Company in the Court of Claims to recover a balance claimed for tobacco products obtained from it for the Navy and Marine Corps. The Court of Claims found the value but refused to allow interest or its equivalent. The claimant contended that the products were taken under the power of eminent domain and that it was entitled to such additional sum as would produce the equivalent of their value paid at the time of taking, and that interest at a reasonable rate was the measure of the amount required to be added in order to make just compensation.

This Court said (p. 218) that "the sole question is whether the facts found constitute a taking by eminent domain," and then, after reviewing the evidence, concluded that (p. 220): "The findings show that plaintiff's property was taken by eminent domain; and its just compensation includes the additional amount claimed."

Phelps v. *United States,* 274 U.S. 341, was a suit brought against the United States in the Court of Claims for a taking under the authority of the Act of August 29, 1916, c. 418, 39 Stat. 619, 645, and the Act of August 10, 1917, Sec. 10, c. 53, 40 Stat. 276, 279, known as the Lever Act.

The plaintiff contended (p. 343) that "there should be added such sums as will produce the equivalent of the value of the use of the leased property paid contemporaneously; and that interest at a reasonable rate from the date of the use to the time of payment is a good measure of the amount to be added in order to make just compensation." The Court of Claims held against the plaintiff and this Court reversed the lower court.

This Court said (p. 343):

> This action was brought under § 145 of the Judicial Code. That section gives to the Court of Claims jurisdiction to hear and determine "all claims (except for pensions) founded upon the Constitution of the United States or * * * upon any contract, express or implied, with the Government of the United States * * *." Section 177 provides that no interest shall be allowed on any claim up to the time of the rendition of judgment unless upon a contract expressly stipulating for its payment. Under the Fifth Amendment plaintiffs were entitled to just compensation; and, within the meaning of § 145, the claim is one founded on the Constitution. Moreover, it has long been established that, where pursuant to an Act of Congress private property is taken for public use by officers or agents of the United States, the Government is under an implied obligation to make just compensation. That implication being consistent with the constitutional duty of the Government

> as well as with common justice, the owner's claim is one arising out of implied contract. * * *

In distinguishing the *North American* case, this Court said (pp. 343–344):

> The distinction between the cause of action considered in *United States* v. *North American Co.*, 253 U.S. 330, and a taking under the power of eminent domain was pointed out in *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299.

The Court then concluded as follows (p. 344):

> Plaintiffs' property was taken before its value was ascertained or paid. Judgment in 1926 for the value of the use of the property in 1918 and 1919, without more, is not sufficient to constitute just compensation. Section 177 does not prohibit the inclusion of the additional amount for which petitioner contends. It is not a claim for interest within the purpose or intention of that section. Acts of Congress are to be construed and applied in harmony with and not to thwart the purpose of the Constitution. The Government's obligation is to put the owners in as good position pecuniarily as if the use of their property had not been taken. They are entitled to have the full equivalent of the value of such use at the time of the taking paid contemporaneously with the taking. As such payment has not been made, petitioner is entitled to the additional amount claimed. * * *

In *Hurley* v. *Kincaid*, 285 U.S. 95, an owner of land brought suit praying for an injunction to prevent the Government from carrying out work authorized by the Mississippi River Flood Control Act, without first instituting condemnation proceedings. This Court dismissed the bill, holding that the complainant has a plain, adequate, and complete remedy at law. The Court said (p. 104):

> If that which has been done, or is contemplated, does constitute such a taking, the complainant can recover just compensation under the Tucker Act in an action at law as upon an implied contract, since the validity of the Act and the authority of the defendants are conceded. * * * The compensation which he may obtain in such a proceeding will be the same as that which he might have been awarded had the defendants instituted the condemnation proceedings which it is contended the statute requires.

This language, if it refers to compensation as of the date of the taking is in accordance with *United States* v. *North American Co.*, 253 U.S. 330. The question of interest was not before the Court. The Court stated, as in the *North American* case, that the suit under the Tucker Act is founded upon an implied contract, and there is no suggestion that it intended to depart from the *North American Co.* case as to the nature of that implied contract, or as to the prohibition of interest in such suits.

The Act of April 24, 1888, c. 194, 25 Stat. 94 (U.S.C., Title 33, Sec. 591; *supra,* p. 3), authorizes the Secretary of War to institute proceedings to acquire by condemnation any land which is needed for the improvement of rivers and harbors for which provision has been made by law. Such proceedings are to be prosecuted in accordance with the laws of the State where the suit is brought. In the instant case, however, no such proceedings were instituted. There was no taking here in the nature of a condemnation under the Lever Act, or similar statute. We submit that the jurisdiction of the trial court in this case depends solely upon the existence of an implied contract, and that interest may not be included in the damages in such a suit if *United States* v. *North American Co.* is still law.

In the *North American* case, the property was taken by the Government under its power of eminent domain pursuant to a statute similar to the one involved in the instant case. No condemnation suit was brought by the Government prior to the taking. The owner brought suit in the Court of Claims under the Tucker Act. This Court held that the right to bring the suit in the Court of Claims was not founded upon the Fifth Amendment, but upon an implied contract to pay the value of the property at the date of taking, and that interest might not be added because of Section 177 of the Judicial Code.

It would seem clear that the case at bar is governed by the *North American* case, as held by the court below, unless the rule of that case has been modified by the later decisions referred to above. In at least three of these cases the *North American* case is distinguished, but not overruled. It is, however, difficult to reconcile the *North American* case with some of the later decisions.

The distinction made in the *Seaboard Air Line* case, and referred to in the *Phelps* case, is that the *North American* case was not a condemnation case, but a suit based on an implied contract to pay for the property. In the *Seaboard Air Line* case the taking was under the Lever Act, and the owner brought suit in the District Court under the provisions of that Act expressly directing the payment of "just compensation." This Court decided that the just compensation provided by the statute included interest. Cf. *Waite* v. *United States,* 282 U.S. 508. In the *Phelps* case, while the taking was under the Lever Act, the claim was not prosecuted under the procedure provided by that Act. Phelps brought his suit in the Court of Claims, a court which had no jurisdiction of a claim under Section 10 of the Lever Act. *United States* v. *Pfitsch,* 256 U.S. 547. This Court held that the claim was founded on the Fifth Amendment and that there was an implied obligation to make just compensation. If the decision stood on this ground alone, it might be reconcilable with the *North American*

case, which was distinguished in the opinion. But the Court also held that the owner's claim was one arising out of implied contract, but that, nevertheless, Section 177 of the Judicial Code did not prohibit the inclusion of interest, because the claim was not for interest within the meaning of that section. The *Liggett & Myers* case was also a suit in the Court of Claims under the Tucker Act. This Court held that the claimant's property was taken by eminent domain and that its just compensation included interest.

In the *Phelps* and *Liggett & Myers* cases the taking was in each case under the provisions of a statute which expressly provided for the payment of "just compensation." Neither of the suits, however, was brought under that statute; both were suits under the Tucker Act in the general jurisdiction of the Court of Claims. It is possible, however, that the fact that the taking was under the Lever Act, or a statute similar to it, may have influenced the result.

In the case at bar, as in the *North American* case, the only statute involved is a general statute authorizing the construction of improvements, making no express provision for the payment of "just compensation" and setting up no procedure for the bringing of suit by the claimant in case the Government failed to start condemnation proceedings. The claimant's case, therefore, cannot rest directly on the terms of any statute

(unless it is held to be a claim under the Constitution within the Tucker Act), but must depend on the existence of an implied contract. In a suit brought on such a basis the *North American* case holds that interest may not be included in the damages allowed.

CONCLUSION

If the rule of the *North American* case is still to be followed, the judgment below should be affirmed. Whether that rule has been modified by the *Phelps* case and the other cases referred to is a question for the consideration of this Court.

Respectfully submitted.

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